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STATUTES CITED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. ————

JACOB FREIDUS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Jacob Freidus prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered June 20, 1951, which affirmed the judgment of the United States District Court for the Southern District of New York, entered November 13, 1950 (fols. 46-50), adjudging petitioner guilty of attempting to evade Federal income tax for the years 1942 and 1943 in violation of Section 145(b) of Title 26 of the United States Code.

Petitioner was jointly indicted with his business partner and stepfather, Samuel E. Aaron (fols. 29-33). They were tried together and both were convicted. Both appealed to the Court of Appeals; their appeal was argued on March 15, 1951; the decision, affirming the judgment as to each defendant was rendered on June 20, 1951. Immediately after the decision an order was entered in the District Court reducing the prison sentence of Aaron from two years to eight months. This effected his immediate

release and for that reason he does not join in this petition. The petitioner and Aaron are jointly referred to herein as the "defendants".

Opinion Below

The opinion of the Court of Appeals is set forth in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on June 20, 1951. The jurisdiction of this Court is invoked under 28 *U. S. C.*, § 1254.

Statute Involved

Section 145(b) of Title 26 of the United States Code reads as follows:

> "(b) *Failure to collect and pay over tax, or attempt to defeat or evade tax.* Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Questions Presented

The Trial Judge assumed the role of prosecutor in the instant case. He took the prosecution out of the hands of the United States Attorney and took it upon himself

to see to it that the defendants were convicted. He constantly interrupted the examination of defendants by their counsel to ask such questions and make such comment as would clearly indicate to the jury that he thought that defendants were guilty and should be convicted. In the cross-examination of the defendants he joined in a hue and cry against them and by his questions and comment destroyed any semblance of trial by jury. In conducting the examination of a Government witness, on the other hand, he used the same great prestige of his judicial office to bolster and sustain the testimony.

Petitioner submits that he was thus deprived of the fair and impartial jury trial to which he was entitled under the Fifth and Sixth Amendments of the Constitution of the United States and that his conviction is accordingly void.

The other questions presented are evidence questions of a substantial nature. The accusation against the defendants was that they made sales of used machinery which they did not report as income on their income tax returns. Defendants conceded that this was so, but contended that the receipts from these sales did not constitute taxable income since the money had been used for business expense. The defendants testified that they had to make cash purchases in the regular course of their business from persons who refused to give them receipts. One of these persons was Stanley Selkowsky. He was dead at the time of the trial and the Government produced his wife, Mary, as a witness.

She was allowed to testify, over the objection of petitioner's counsel, that the defendants had made no substantial payments to her husband. She was allowed to so testify even though she had no personal knowledge whatever on the subject. Since the issue submitted to the jury was the credibility of the defendants' testimony concerning payments to Selkowsky and others, it was prejudicial error to allow Mrs. Selkowsky to give testimony on that subject which was pure opinion based solely on speculation. It

was even less than hearsay since its only foundation was, not what her husband had told her, but on the contrary what he had not told her; and the naive premise that "most husbands tell their wives everything".

The second evidence question involves the Government's use of a Selective Service affidavit of one Robert Selinsky. It was the defendants' testimony that they used the unreported sales receipts to reimburse themselves for personal advances they had made to their business. They testified that $25,000 of the money which they had advanced they had borrowed from Samuel Selinsky, petitioner's grandfather. In an effort to rebut this testimony, the United States Attorney asked the petitioner whether he did not know that in his Selective Service affidavit Robert Selinsky had listed Samuel Selinsky as a partial dependent and had stated that Samuel Selinsky and his wife were recipients of old age pensions (fols. 3219-20). The questions were objected to, but the objections were overruled (fols. 3219-20).

What Robert Selinsky might have said in his Selective Service affidavit was, of course, not binding on petitioners; and the Court actually excluded Robert Selinsky's Selective Service affidavit when it was later offered in evidence by the Government (fols. 4220-24). The Court then stated (fol. 4232), without the hearing of the jury: "* * * so far as this defendant is concerned, that is clearly a hearsay document. He may not have been telling the truth. He may have had a purpose in evading." Of course this was very true, but the damage had already been done when the Court allowed the United States Attorney to question the petitioner on the basis of asserted contents of the Selinsky affidavit.

The purpose of the Government's reference to the contents of the affidavit was to refute the defendants' testimony that Samuel Selinsky had loaned them $25,000. Since the issue submitted to the jury was the credibility of the defendants' testimony, the error in allowing the reference to the contents of the affidavit was clearly prejudicial.

Summary Statement of Matter Involved

Petitioner was indicted on four counts for attempting to evade income tax owing by himself and his wife for the years 1942 and 1943.

The defendant Aaron was indicted on three counts for attempting to evade income tax owing by himself for the year 1943 and by his wife for the years 1942 and 1943.

Both defendants pleaded not guilty (fol. 34). The trial began on October 9, 1950, and continued to November 13, 1950 (fols. 34-38). The jury found the defendants guilty as charged on all counts of the indictment (fol. 11).

The Court sentenced petitioner to four years imprisonment on each of the four counts, the sentences to run concurrently, and fined him $10,000 on each count, or a total of $40,000 (fols. 48-49). The Court sentenced Aaron to two years imprisonment on each of the three counts, the sentences to run concurrently, and fined him $10,000 on each count, or a total of $30,000 (fol. 44).

In the years involved, the defendants and their wives were in the business of selling used machinery as partners in the firm of Aaron Machinery Company which has its offices in New York City.

In the years 1941 and 1942 Aaron Machinery Company did not record on its books some $283,000 of the sales which it had made. The receipts from these sales were not deposited in the bank in which the company usually made its deposits but were deposited in company accounts in three other banks. These banks accounts were not recorded on the company's books and the monies deposited therein were not reported as part of the partnership's distributable income.

The Government contended that most of these receipts constituted net income for Federal income tax purposes, and that the defendants had wilfully attempted to evade taxation by failing to include their distributable share of

the receipts in their income tax returns. The defendants contended that these receipts did not constitute net income inasmuch as the money was used for legitimate business expense deductible for income tax purposes.

The defendants' testimony on this score was as follows:

As of January, 1941, the partners had contributed $105,000 in cash to their firm (fol. 3055). Of this amount $25,000 was borrowed from Samuel Selinsky, petitioner's grandfather (fols. 3056-57), $45,000 was paid in by Mr. and Mrs. Aaron (fols. 3800-2) and the remainder by the petitioner (fols. 2702, 3055).

In the early part of 1941, the partnership spent about $65,000 of this cash for the purchase of machinery, and for finders' fees and commissions (fols. 2677-78). Machinery was extremely scarce in this period and many of the people from whom the defendants were able to purchase machinery insisted on being paid cash for which they would give no receipt (fols. 2674-77, 3803-17).

In the fall of 1941, petitioner took the problem to his accountant, Louis J. Botwin (fol. 2674), who prepared the defendants' income tax returns and those of Aaron Machinery Company (fols. 1097-1105). He had set up the partnership books to include the defendants' wives as partners (fols. 1174-75) and his compensation for his services for the period ending January 31, 1941, was, as he testified, 25% of the tax savings resulting from the four-way partnership as against the two-way partnership (fol. 1141).

Petitioner testified that Botwin advised him that he could not get a business deduction on payments made in cash for which he had no receipt. Botwin told him to open a separate checking account, to divert the receipts from some of the larger sales to this account, and to use this account for payments for machinery and to reimburse the partners for their previous personal advances (fols. 2676-77, 2714-16). Petitioner testified that he recognized that this created an income tax problem and that Botwin told him that he would take care of that at the end of the year. Botwin stated to

him that if he used the money for business expense that would "wash out the income" (fols. 3074-79). Botwin told him that his plan was to consolidate the accounts on the books of the company (fol. 3087).

When Botwin failed to present a solution, after many inquiries from both Freidus and Aaron (fols. 3085-86, 3963-65), the accounts were closed.

Petitioner testified to the various cash payments that were made for business expenses of Aaron Machinery Company and not recorded on the books. He had made a written record of these payments which he turned over to Botwin in 1945. However, Botwin would not return the records and petitioner accordingly had to rely on his memory for these transactions which occurred eight and nine years prior to the trial (fols. 2781-85). Defendants' Exhibit NNN consists of a schedule of these payments as testified to by petitioner.

The Government conceded that some of the payments from the three bank accounts were made for business purposes, i.e., the payment of $7,000 to B. Fink and the payment of $3,000 to F. C. Kent (fols. 1568-77, Defts.' Exs. M, N).

Many of the payments testified to by petitioner were substantiated by independent testimony. Cash payments by Aaron Machinery Company to Stanley Selkowsky (Stanley Machinery Co.) were verified by Herman M. Newman (fol. 1718), Monroe L. Gelt (fols. 1736-45), Richard Jenkins (fols. 1756-58) and Louis Gendelman (fols. 2003-6). Cash payments by Aaron Machinery Company to Benjamin Machol were attested to by Reuben Beckler (fols. 1791-93), Frederick Machol (fols. 1960-63), William Carey (fols. 2033-36), Milton A. Wertman (fols. 2280-83) and Joseph Messey (fols. 1860-71). Cash payments by the defendant Aaron at auctions were testified to by Louis Rosen (fols. 2041-46) and by Ralph Hochman (fol. 2240). A cash payment to R. Petersan was testified to by Louis Gendelman (fols. 2306-9), Reuben Beckler testified to the cash payments he received from the defendant Aaron (fol.

1793), and Martin T. Peterson testified to a cash payment made by Aaron for machinery to a man unknown to Peterson (fols. 2182-87).

The Trial Court instructed the jury that they were entitled to acquit the defendants if they believed their testimony. The Court stated (fols. 4733-35):

> "If you believe that the defendants and the members of their families had the $105,000 at the beginning of the period and if you believe their testimony as to the purchases of machinery for cash, the payments of commissions to Machol, the purchase of $31,000 of machinery from Stanley Selkowsky, and the other items about which they have testified, and if you believe that they opened the bank accounts in good faith, and if you find from all of the evidence that the withdrawals from the three accounts were for the purpose of restoring to themselves moneys advanced by them for the benefit of the business, then it follows that no substantial amount of taxes was attempted to be defeated and evaded, and you may acquit the defendants.
>
> However, if you are satisfied beyond a reasonable doubt that these defendants did not have the money, the $105,000, at the beginning of the period, namely, January of 1941, or that the moneys were not expended for partnership purposes and that the defendants dealt with their income, bank deposits and expenditures as they did in an attempt to defeat and evade the taxes due and owing by them and their wives, respectively, as alleged in the indictment, then you may find the defendants guilty as alleged in the indictment."

There was thus a clear-cut issue in the case and that issue rested on the defendants' credibility. Because of the conduct of the Trial Judge, petitioner did not have a fair trial of that issue.

Since the conduct of the Judge cannot be considered apart from his actual questions and comment during the trial, it is necessary to set forth these matters at some length. However, we shall set forth only what we consider the more flagrant examples of his improper participation in the trial.

The Direct Examination of the Petitioner

The Judge interrupted petitioner's counsel during his direct examination of the petitioner no less than fifty-seven times, putting some 338 questions to the petitioner.

At one point, petitioner testified concerning the purchase of machinery for a total of $16,000, of which he claimed $5,000 was paid in cash, although the bill was for only $11,000 (fols. 2777-84).

The Court took up this point and severely castigated the petitioner before the jury in the following series of questions (fols. 2786-89):

"Q. Well, didn't you know that it was wrong to take a bill from someone for $11,000 and pay him $16,000? You knew that, didn't you? A. I didn't know it was wrong.

Q. You didn't know it was wrong? A. Well, why? Was it wrong if the man only wants to give me a bill for 11,000, and if I wanted to do business with him I had to do it on his terms.

Q. You did not think it was wrong to do it that way, is that right? A. Well, as I told you previously in the day, I consulted, when this type of transaction first came out in '41, I had consulted with the accountant and he said that is the way to handle it, and if I didn't do it that way he would sell the machines to someone else.

Q. Do you mean to say that you had a talk with someone to find out whether a transaction like that was right or wrong, that you did not know yourself whether it was right or wrong? A. I am saying, your Honor, that when this type of transaction first came up I consulted with my accountant, and he told me how to handle it. Thereafter I didn't ask him every time a similar transaction came up. I didn't ask him how to handle it.

Q. You say that Mr. Botwin told you to handle this transaction that way? A. I say that, that is right.

Q. And didn't it occur to you that it was wrong to do business that way? A. I didn't see how it was wrong to do business that way.

Q. You didn't? A. No, I mean that if a man wants to sell me machines, and he wants a price of $16,000 and he says, 'Now, I want $11,000 by check and $5,000 in cash,' no.

Q. Even though you get a bill from him for $11,000, is that right? A. That is right."

The Court then permitted petitioner's counsel to ask three questions, but interrupted him in the middle of the next question to question petitioner again on the subject of the $16,000 (fols. 2791-93):

"Q. In either event you knew that he was doing something that was wrong in doing it that way, isn't that right? A. Yes.

Q. What? A. Yes.

Q. And you knew that you were helping him do it wrong, didn't you? A. Well——

Q. Didn't you? A. I don't know if I was helping him.

Q. When you accepted the $11,000 bill and gave him $11,000 and $5,000 in cash, weren't you helping him either to conceal a tax return by him, or an OPA ceiling violation by him? A. Well, I don't know, your Honor. It is common practice in our industry, or it is generally done in the industry if a man insists on cash, and it happens very often.

Q. Well, you were in court the other day, weren't you, when Mr. Wertman testified? A. Yes, I was.

Mr. Margiotti: Who, Judge?

The Court: Wertman. No, I am wrong about Mr. Wertman.

Q. When Mr. Hess testified? A. That is right.

Q. Do you remember that he testified that all second-hand machinery is always sold for cash? Do you remember that testimony? A. I don't recall it.

Q. You don't recall that testimony? A. I don't recall the witness' exact testimony.

Q. Do you recall that Mr. Hess so testified? A. No, I recall that Mr. Hess testified, but I don't recall his exact testimony.

Q. I see. And you don't recall that he said that all second-hand machinery was always sold for cash? A. I don't know if I heard that particular answer."

Petitioner testified concerning the payment of a commission of $2,000 to a man named Paxos in connection with the sale of machinery (fols. 2849-52). The Court took this occasion to attack the petitioner as follows (fols. 2852-54):

"Q. Don't you know that that violates the law, to give an employee of a customer a commission in connection with the purchase or the sale? Don't you know that? A. All I know, Judge, is that it is done every day.

Q. I didn't ask you that. I say, don't you know that it is a violation of the laws of the State of New York for any seller to give a commission to the employee of a buyer? A. I don't know.

Q. You did not know that? A. No.

Mr. Margiotti: Keep your voice up.

The Witness: I don't know that.

Q. And you don't know it yet? A. Well, I assume that it is so if you indicate it."

Petitioner next testified to a sale of machinery for $31,000 to the Atlantic Basin Iron Works and stated that he made a cash payment of $7,500 to an employee of that concern in connection with the sale (fols. 2856-75). Then he testified to the payment of a commission of $2,000 in connection with the sale of machinery to the Eclipse Aviation Corporation (fol. 2884).

The Trial Court did not allow the examination to proceed but instead took over the examination at that point and brought petitioner back to the Atlantic Basin transaction. The Court asked the following questions in an obvious attempt to show that petitioner was devoid of moral sense (fols. 2887-94):

"Q. Now, coming back to this Atlantic Basin transaction— A. Yes.

Q. —that was a transaction involving some $31,000? A. Yes.

Q. You knew that Peterson was employed by the Atlantic Basin Company, did you not? A. I assume so, yes.

Q. Don't tell me what you assume. A. I believe that he was.

Q. You knew that he was the purchasing agent? A. He was not the purchasing agent.

Q. You testified before that he was the purchasing agent? A. No, I never testified to that. If I did, I was mistaken. I never said he was a purchasing agent——

Mr. Margiotti: Keep your voice up.

The Witness: I don't believe that I ever said he was the purchasing agent. He approved the purchases, but he was more or less of a plant superintendent.

Q. You knew that he was employed by the Atlantic Basin Company? A. Yes, sir.

Q. And you want us to understand that you paid him a commission of $7500 on a total sale of $31,000? A. Yes.

Q. Or approximately 25 percent? A. That is right.

Q. Didn't you recognize that you were not dealing fairly with your customer, the Atlantic Basin Company, by paying a bribe— A. Well, just a moment.

Q. —to an employee of the company? A. Just a moment, your Honor. We would not stay in business very long if——

Q. I didn't ask you that. Didn't you recognize what I asked you? A. No, I did not recognize it in the light in which you are putting it.

Q. You mean that you did not understand that it was wrong as a matter of business ethics to bribe an employee of the person to whom you sold goods? A. Your Honor, as a matter of business, it is so common in the industry that I guess you don't realize it is wrong.

Q. You mean to say— A. Well, your Honor, I can bring here——

Q. You are a college graduate, are you not? A. Yes, I am.

Q. And you certainly have read newspapers, have you not, over the years? A. Yes, I have.

Q. And you want us to understand that you did not know that it was improper, unlawful or unethical for you to bribe one of your customer's employees in order to make a sale of machinery? Is that what you want us to understand? A. Your Honor——

Q. Is that what you want us to understand? A. Your Honor, I never thought of it in the form of a bribe. I didn't ask Mr. Peterson to please take the money and approve the sale. I quoted my price, and if Mr. Peterson tells me to bill his firm X or Y dollars for it, over and above it, I either have to pay it as I am told or, if not, lose the business.

Q. You were not worrying about business at that time because you had a seller's market, didn't you? A. One does not realize when one is in a seller's market. One just goes about their business day to day. I did not stop and say at any particular point—your Honor, I can go back, if I may, and explain——

Q. No. A. I want to explain my position.

Q. We have had enough explanations now. A. Well——

Q. We have it, then, that you did not realize that you were doing something illegal, unethical or morally wrong by paying a secret commission to an employee of one of your customers? Is that what you want us to understand? A. All I know is that I was doing business the way business was accustomed to be done in the business.

Q. Did the Atlantic Basin Company know that you were paying 25 percent, approximately, to one of their employees in doing that business? A. Of course not.

Q. They did not? A. No, they did not.

Q. And you knew that that was to be a secret transaction? A. Yes, I did.

Q. And yet you tell us that you did not regard it as being wrong? A. Well, maybe because it is so common.

Q. All right. A. And it happens in every-day transactions."

Counsel for petitioner, who had studiously followed a policy of respectful appeasement of the Trial Judge, could not fail to appreciate that the Court had effectively dealt a body blow to the petitioner and to any testimony that he might thereafter offer and requested the Court to instruct the jury that they should not infer guilt from petitioner's conduct in making the payments to which the Judge had referred in his examination (fols. 2902-3).

However, the Court only planted the barb deeper by telling the jury (fol. 2905):

> "That line of interrogation was followed for only one purpose, and that is in connection with the credibility of the story of this witness, and for no other purpose."

Under the Judge's own charge (fols. 4733-35) "incredibility" and "guilt" were synonymous.

Later testimony was given by petitioner concerning travel and entertainment expenses which were not reflected on the company's books (fols. 2993-94). The Court intervened as follows (fols. 3004-5):

> "The Court: You have not answered why were they not recorded on the books, the expenses that were legitimately deductible?
>
> The Witness: I believe there was one instance where we put down in our books several hundred dollars for entertainment. Our accountant questioned it by saying he did not think on examination by Revenue Agents that that deduction would be allowed without substantiation, and therefore we felt we would be better off where we did spend large amounts for entertainment, that we used the cash that we had.
>
> The Court: *You thought it would be easier to convince a jury than it would be a Revenue Agent?*
>
> The Witness: I never thought I would come before a jury, your Honor.
>
> Q. (By his counsel) What was the answer? A. I never thought I would come before a jury, I never felt I was evading any taxes." (Italics ours.)

Thereafter, petitioner's counsel began to inquire of petitioner what he had done with the proceeds of a $10,000 check that he had cashed. Petitioner's counsel asked him, "Do you know what you used the cash for?" (fol. 3021). Before petitioner could answer the Court took over, to indicate that it would accept but one answer from the witness (fols. 3021-23):

"The Court: Don't you know that all of those checks were used for the purpose of converting them into cash and then making deposits of those proceeds in the various savings and loan accounts, don't you know that? Answer that yes or no.

The Witness: I am not certain, but it was to reimburse myself. That was reimbursement to myself, your Honor.

The Court: Strike out the answer. Do you know whether the proceeds of any of those checks were used for the purpose of making deposits in savings and loan association accounts?

The Witness: There is no question, your Honor, that I opened up federal savings and loan accounts at that time.

The Court: That is all there is to it."

Several other examples of the Court's antagonistic attitude during the direct examination of petitioner can be quickly referred to:

1. The Court's reference to petitioner's testimony as his "story" (fol. 2809).

2. The Court's consistent prefacing of its questions to petitioner with the incredulous phrase "Do you want us to understand" (fols. 2883, 2889, 2890).

3. The Court's curt statement, after petitioner had answered its questions (fol. 2837): "All right, if you are satisfied with that explanation, it is all right."

4. Comment by the Court of a sarcastic nature: "You didn't put them [the machines] in your pocket?" (fol. 2731); "Is that what you want to testify now?" (fol. 2945); "The Court: Mr. Margiotti, he testified that he talked to somebody on the telephone and somebody on the telephone said to him, 'We want certain material. Somebody, *some guy* is coming in to see you tomorrow'" (fol. 2941). (Italics ours.)

The Cross-Examination of Petitioner

Although the Government was represented by an able, alert and vigorous prosecutrix, the Judge continued to inject himself, as a prosecutor, into the cross-examination in the same manner and with the same effect as he had done on the direct examination.

In this cross-examination, the District Judge asked the witness at least 107 questions to the 365 questions addressed by the prosecutrix. They were of the same character as on direct, all calculated to induce a belief in the minds of the jury that the defendants were guilty. For example: the Assistant United States Attorney was examining petitioner with respect to whether he had stated in his Selective Service questionnaire that he had no property (fol. 3242). The Judge, asking for the questionnaire (fol. 3243), himself examined petitioner. We find this (fols. 3243-44):

> "The Court: I direct your attention to question No. 6. The question is, the following is a description of all property owned by (or held in trust by) either myself or my dependents (do not include clothing, personal effects, household furnishings or automobiles). Indicate which of such property is in your home. Then it gives you a table under the heading of 'Name of person'. Then the heading: Kind of property.
>
> What did you understand by the words 'Kind of property'?
>
> The Witness: Property, I understood to mean a building or a house or land. That is my understanding of property, of the word property.
>
> The Court: *Our colleges do not do a very good job apparently.*" (Italics ours.)

Petitioner's counsel moved for a mistrial, stating the grounds for the motion as follows (fol. 3245):

> "Mr. Margiotti: In view of the Court's remarks, if your Honor please, as to this witness' college educa-

tion, we ask for the withdrawal of a juror, for the reason that your Honor's remarks are such as to be prejudicial to this defendant and tend not to permit him to obtain the fair and impartial trial to which he is entitled under the Constitution of the United States."

Shortly thereafter, the Court took over the cross-examination to ask these highly prejudicial questions (fols. 3266-68):

"Q. Mr. Freidus, do you mean to say that you hired an accountant for the purpose of preparing a schedule in this case and in which schedule an attempt was made to account for part of the money drawn out of these three accounts and that you never saw it and don't know anything about it? Is that what you want us to understand? A. I want you to understand that I did not engage the accountant to get this information. The accountant was engaged some years ago by an attorney to——

Q. Well, it was for your benefit. You knew the attorney was doing it, didn't you? A. He was engaged, as I understand it, by an attorney to see what if he were an agent, what the agent would have found, because we had no way of knowing what the agents were claiming, and he was engaged by the attorneys to study this matter in the same fashion as the revenue agents studied this matter.

Q. But the fact that he studied it as a revenue agent would indicate that he studied it for your benefit, isn't that right? A. That is right.

Q. And he reported to you, did he not? A. No, he did not.

Q. At no time? A. No, he reported to the attorney.

Q. Now, during the course of the progress of this trial, didn't you go over these papers so as to be able to testify and tell us about the details? A. No, the first time I went over this chart was when I spent about five minutes this morning. That was with the accountant this morning, and that is the first time I ever looked at that chart.

Q. You don't regard it as important to your case, is that it? A. I regard everything in this case as important."

Shortly after, we find this observation by the Court (fol. 3279):

"The Court: You have not any memory at all about these items, except what you see on the paper, and then you are not sure about that?"

Beginning at folio 3420, the Court asked a series of twenty-eight questions among them such typical prosecutor's questions as:

"Q. Don't you remember?"

"Q. I didn't ask you how, I asked you don't you remember it?"

"Q. Do you want us to understand that you are not even interested in looking at the partnership returns and you do not recall it, is that what you want us to understand?"

"Q. Is that what you want us to understand?"

"Q. Do you want us to understand that after the investigation started and the agent requested that a new return be made for the partnership and when it was signed by Mr. Aaron that you did not see it?"

"Q. Do you want us to understand that you do not remember them specifically?"

"Q. And you knew those returns were not true returns, did you not?"

At this point, petitioner's counsel again moved for mistrial, stating the grounds of the motion as follows (fols. 3427-28):

"Mr. Margiotti: At this time I move for the withdrawal of a juror and discontinuance of the case. This motion is being made by and on behalf of all counsel representing the defendants, as based upon the prejudicial conduct of the Court in the following: First, the Court has time and time again examined witnesses for the Government in such a way as to bring out the most favorable aspects of their testimony for the Gov-

ernment. The Court has unnecessarily and most prejudicially and in a vigorous manner, cross-examined the witnesses for the defense, particularly the defendant himself, who has been subjected to cross-examination after cross-examination by the Court, and in a manner as to definitely create the impression on this jury that the Court does not believe the defendant. We feel that the conduct of the Court in carrying on these examinations is such as is depriving this defendant of a fair and impartial trial as guaranteed to him by the Constitution of the United States."

The Examination of the Defendant Aaron

During the trial the defendant Aaron suffered a heart attack and was ordered committed to the prison ward of Bellevue Hospital (fol. 10). He was so sick and weak when on the witness stand (fol. 3793) that it was rather pointless to castigate him in the same manner that petitioner had been castigated. Nevertheless the Court continued its frequent interruptions of the direct examination (fols. 3789, 3796, 3807-08, 3827, 3840-41, 3844, 3866-69, 3872-75, 3973-74). On the cross-examination of the defendant Aaron the Judge injected himself into the examination even more frequently than he had done on the direct examination. The Court asked eighty questions to 207 questions asked by the Assistant United States Attorney.

The Court's Examination of Petitioner's Other Witnesses

In the same manner, the Judge interjected himself into the examination of petitioner's witnesses, all of his questions being in the nature of a vigorous cross-examination: Newman, some twenty-three questions (fols. 1725, 1731); Gelt, twenty-eight questions (fols. 1743, 1745); Jenkins, six questions (fol. 1772); Beckler, sixteen questions (fol. 1845); Messey, forty-two questions (fols. 1901, 1916, 1935);

Peterson, twenty questions (fols. 2214, 2231); Gendelman, twenty-six questions (fols. 2005, 2007, 2317).

Perhaps the most striking example of how the Judge exercised the high prestige of his judicial office in favor of the prosecution is found in his examination of Louis Rosen. Rosen was called as a witness by the defendants solely to testify that he was present at an auction sale in 1942, attended by Aaron, and that he was a witness to a transaction whereby Aaron purchased machinery for $1,500 cash from a successful bidder at the auction (fols. 2040, 2042, 2045). The direct examination of the witness occupies ten folios of the record.

The Assistant United States Attorney was permitted to ask only two questions before the Court assumed the burden of the cross-examination (fol. 2048). We quote from the record:

> "Q. Who was the successful bidder? A. Well, it seems to me that that man's name was Morris Gubenko. Q. Where is he now? A. He is dead.
>
> The Court: He is dead, too?
> The Witness: Gubenko is dead, yes."

The Court then and there undertook a long cross-examination of the witness, designed to create the impression that the witness' story was an afterthought and the result of a conversation with Aaron six months before the trial (fols. 2048-55, 2058-62, 2065-70). The Court then made this blunt statement, in the presence of the jury (fol. 2071):

> "The Court: All right. *I don't believe this testimony at all, Mr. Margiotti.*
> Mr. Margiotti: What is that, your Honor?
> The Court: *I don't believe this testimony at all.*"
> (Italics ours.)

Petitioner's counsel immediately moved for a mistrial, stating his grounds as follows (fol. 2072):

"Mr. Margiotti: In view of the remarks of the Court in which he expressed his opinion concerning not believing the witness at all, we ask now for the withdrawal of a juror and a dismissal of the case for the reason that the remark was highly prejudicial to the defendants. It is our position that whether or not this witness is to be believed is not for the Court but for the jury under proper instructions given by the Court."

The motion was categorically denied (fol. 2073).

This statement of the Court's disbelief of the witness' testimony was made by the Court on October 27th. It was not until 17 days later that the Court on November 13th in his charge, referring to his comment with respect to the testimony of the witness Rosen, stated that the jury was to disregard that comment because they are the exclusive judges of the facts and of the credibility of the witnesses (fol. 4682). Far from correcting this error, this served only to repeat and drive home the Court's comment by repetition at the very end of the case.

A similar observation, in the presence of the jury, was made by the Court with respect to the testimony of Max W. Schachter, another of the petitioner's witnesses (fol. 2465). Commenting on this witness' testimony, the Court stated (fol. 2465):

"The Court: He is prepared to testify to those things that he wants to testify to, but he is not prepared to testify to other things that are relevant and material to this inquiry."

Again counsel moved for a mistrial (fol. 2468) in the following language:

"Mr. Margiotti: We say that the Court's remarks referring to this witness as being an unprepared witness and being critical of the witness were prejudicial to the cause of the defense, and we ask for the withdrawal of a juror and a discontinuance of the case.

The Court: The motion is denied.

Mr. Margiotti: Exception."

The Other Side of the Shield

In the case of the defendants and their witnesses the Judge used the prestige of his high office to break down and destroy their credibility. He used the same great prestige of office to bolster up and sustain the testimony of the Government's witness, Mary Selkowsky. She was called by the Government, in rebuttal, to contradict the testimony of the defendants and their witnesses Newman (fol. 1718), Gelt (fols. 1736-45), Jenkins (fols. 1756-58) and Gendelman (fols. 2003-6). This testimony bore on the vital issue recognized in the Court's charge (fols. 4733-34), that is to say, whether the defendants had made numerous and substantial cash payments for the purchase of machinery for resale. One of the men to whom the defendants testified they made such payments ($30,000) was Stanley Selkowsky, who operated a second-hand machinery business at Secaucus, New Jersey, and who had died prior to the trial. The Government produced his wife, Mary Selkowsky, as its witness. Over objections by petitioner's counsel, she was allowed to testify categorically that her husband had sold no machinery to the defendants in the years involved and never received $30,000 from them (fols. 3130-47). No foundation whatever had been laid for such testimony. She had not been shown to have had any familiarity with the transaction, and the fact was that Mrs. Selkowsky knew little about her husband's business. She testified (fol. 3152):

> "A. Yes, he took care of the business.
>
> Q. You had nothing to do with making sales or purchases, did you? A. No, I didn't.
>
> Q. Did you ever make a sale or a purchase yourself? A. Yes, one day I sold a lot of belting, and after that I never did because I gave it somebody for half price.
>
> Q. I see. You made a bad deal? A. I made a bad deal and I never sold again."

Her assertion of fact turned out to be based solely on the fiction that "most husbands tell their wives everything" (fol. 3155).

Her testimony, which was nothing but opinion based on speculation, was materially bolstered up by the Court by his intervention into the examination. Intervening in the direct examination (fols. 3131, 3133, 3136-37, 3139-40, 3155), the Court asked:

"Q. Do you know whether in 1941 your husband sold some used machinery to the Aaron Machinery Company? A. I don't think he did.

* * * * * * *

Q. Now, when you said that you don't think that your husband sold any machinery to the Aaron Machinery Company, what do you mean by that? A. Well, I am not sure, but I didn't see him sell anything.

* * * * * * *

Q. (Assistant United States Attorney) Now, Mrs. Selkowsky, did your husband ever receive $30,000 in cash?

Mr. Margiotti: Wait a minute, please.

A. No, he did not.

Mr. Margiotti: Wait a minute. We object to that question and we ask that that answer be stricken out until we make the objection.

The Court: Strike out the answer for the present.

Mr. Margiotti: We object to it. This is no contradiction, your Honor. No one said that she was present, and how would she know whether her husband ever received it or not?

The Court: I think she would know.

Mr. Margiotti: I don't know about that.

The Witness: Sure I would know.

The Court: What is that?

The Witness: Sure I would know.

* * * * * * *

Q. There has been testimony by the defendant, Jacob Freidus in this case, that he gave or saw someone or arranged for someone to give $30,000 in cash to your husband during the early part of 1941 for used ma-

chinery bought from your husband. Can you tell us whether or not your husband sold $30,000 worth of used machinery?

Mr. Margiotti: Wait a minute.

A. No, he did not.

Mr. Margiotti: Wait a minute, please. That question is objected to until it is first ascertained that this woman would be in a position to know. It is negative testimony.

By the Court.

Q. Do you know that he did not? A. I know that he did not. I would know anything like that.

Q. What is that? You would know anything like that? A. Sure I would.

* * * * * * *

Q. (Mr. Margiotti) Well, how would you know about a deal that took place if you were not present? A. My husband would tell me about it. He would tell me everything.

The Court: Everything?

The Witness: I mean most husbands tell their wives everything.

Q. You think most husbands do? A. Yes.

Q. All right. A. Well, mine did, anyhow.

Q. And because you say your husband would tell you everything, that is the reason you're testifying as you are?

Mrs. Shientag: I object to that, your Honor.

Mr. Margiotti: I am asking her.

The Court: I will allow it."

Apparently the purpose of the Judge was to adduce from Mary Selkowsky testimony that her husband's business was "a small business" and that a payment of $30,000 to such a business would be incredible. Beginning at folio 3140 the Court asked her many leading questions, including the following:

"Q. Your husband was running this small business there? A. Yes, a small business."

At folios 3174-75 the Court questioned her as follows:

"Q. $30,000 is a lot of money? A. I should say it was.

Q. Did your husband have that kind of money in machinery during 1941? A. No, sir, he did not, positively not.

Q. He had just a little business? A. Just a little business.

Q. To make a living out of for the family, is that right? A. That is right."

Another example of the Court's conduct during the presentation of the Government's case which seriously prejudiced petitioner occurred during the examination of Government witness, Louis Botwin, the accountant for the company. It appeared from the books of Aaron Machinery Company that that Company had made payments to Abel Engineering Company for services in the amount of $72,000 for the year 1941 and $70,000 for the year 1942. Abel Engineering Company was a partnership comprised of the defendants. In its income tax return Aaron Machinery Company treated this as a business expense. The Government made no claim whatsoever that this was improper and in fact twice during the trial conceded that it did not dispute that item of expense as a legitimate deduction (fols. 1241, 2459).

While that matter thus had no relevancy to the charge being tried, the Judge by the following line of inquiry clearly suggested to the jury that there was something irregular and suspicious about it (fols. 1393-94):

"The Court: You mean to say that they had another engineering company that made a charge of $70,000 for engineering management?

The Witness: That is correct.

The Court: Is there a similar item for the fiscal year ending January 31, 1943?

The Witness: Yes, sir.

The Court: How much was that for?

The Witness: That is for the period ending January 31, 1943, your Honor.

The Court: How much was it for the period ending January 1, 1942?

The Witness: It is $72,000.

The Court: The price went down then, is that right?

The Witness: $2,000, yes, sir.

The Court: And was that also paid to the Abel Engineering Company?

The Witness: Yes, sir.

The Court: And that was a company in which Mr. Freidus and Mr. Aaron were partners, is that correct?

The Witness: Correct, sir."

Reasons for Allowing the Writ

In affirming the judgment of conviction, the Court of Appeals for the Second Circuit has decided a Federal question in a way that is in conflict with the applicable decisions of this Court.

The decisions of this Court hold that a Judge cannot properly fill the role of prosecutor as did the Trial Judge in the instant case.

Quercia v. *United States,* 289 U. S. 466;
Starr v. *United States,* 153 U. S. 614;
Bihn v. *United States,* 328 U. S. 633, 637.

The Court of Appeals has held in the instant case that there was no reversible error because the Judge instructed the jurors that they were the exclusive judges of the facts and the credibility of the witnesses. We submit that this holding is in conflict with the decision of this Court in *Quercia* v. *United States,* 289 U. S. 466, where the Court stated, at page 472:

> "Nor do we think that the error was cured by the statement of the trial judge that his opinion of the evidence was not binding on the jury and that if they did not agree with it they should find the defendant not guilty. His definite and concrete assertion of fact, which he had made with all the persuasiveness of judicial utterance, as to the basis of his opinion, was

not withdrawn. His characterization of the manner and testimony of the accused was of a sort most likely to remain firmly lodged in the memory of the jury and to excite a prejudice which would preclude a fair and dispassionate consideration of the evidence."

In affirming the judgment of conviction, the Court of Appeals for the Second Circuit has rendered a decision in conflict with decisions of Courts of Appeal for other Circuits pertaining to the proper role of the Judge in the trial of criminal cases:

United States v. *Aleli*, 170 F. (2d) 18 (Court of Appeals, 3rd Circuit);

Adler v. *United States*, 182 Fed. 464 (Court of Appeals, 5th Circuit);

Hunter v. *United States*, 62 F. (2d) 217 (Court of Appeals, 5th Circuit);

Gomila v. *United States*, 146 F. (2d) 372 (Court of Appeals, 5th Circuit);

Frantz v. *United States*, 62 F. (2d) 737 (Court of Appeals, 6th Circuit);

Williams v. *United States*, 93 F. (2d) 685 (Court of Appeals, 9th Circuit);

Billeci v. *United States*, 184 F. (2d) 394 (Court of Appeals, District of Columbia).

The admission of the hearsay and opinion testimony of Mary Selkowsky, and the allowance of questions based on the asserted contents of an inadmissible document, were patently violative of established rules of evidence.

In the case of Mary Selkowsky's testimony the Court of Appeals holds that the admission thereof does not constitute reversible error since "it must have been apparent to the jury that this widow did not know as positively as she testified she did that her husband had never made a sale of $30,000 worth of used machinery". But the very function of the rules of evidence is to prohibit a juror from speculating about the probative value of types of testimony which experience has demonstrated to be gen-

erally unreliable. There is no question but that Mary Selkowsky's testimony was inadmissible, and the Court of Appeals erred in excusing its admission on the theory that because of some inherent "ordinary common sense" the jury would not believe what it was improperly allowed to hear. If we are to speculate as to the weight the jury gave the testimony we submit that there is every indication that it gave it great weight. Certainly the Trial Judge lent the high prestige of his office to the position that the testimony was credible. As set forth at page 23 herein, when petitioner's counsel questioned Mrs. Selkowsky's knowledge of the facts to which she was testifying, the Judge stated, in the presence of the jury: "I think she would know."

In the matter of the assertion of the contents of the inadmissible affidavit of Robert Selinsky the Court of Appeals holds that this was not reversible error since the United States Attorney acted in good faith in asking the questions, believing the affidavit to be admissible. That the error of the examiner may have been made in good faith is certainly immaterial. We do not complain of her error in asking the questions but rather of the error of the Court in overruling the objections thereto.

In that portion of its opinion relating to the conduct of the Trial Judge, the Court of Appeals states:

> "Each instance of the questioning on review of the conduct of the trial judge will present its own problems, and in their solution the overriding consideration should be whether the judge saw to it that in the end the jury had before it all, *and only, the admissible evidence produced,* and that it was given to understand that it was free to find the facts as in its collective judgment the evidence showed them to be." (Italics ours.)

In reviewing the evidence questions here presented the Court of Appeals plainly overlooked its own admonition that the jury should have before it "only the admissible evidence".

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN MCKIM MINTON,
Attorney for Petitioner.

EUGENE A. SHERPICK,
RICHARD T. DAVIS,
of Counsel.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 208—October Term, 1950.

(Argued March 15, 1951 Decided June 20, 1951.)

Docket No. 21940

UNITED STATES OF AMERICA,

Appellee,

—against—

SAMUEL E. AARON and JACOB FREIDUS,

Defendants-Appellants.

Before:

SWAN, CHASE and FRANK,

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York after trial by jury and conviction on an indictment charging the violation of Title 26, § 145(b), United States Code, by attempting to defeat

and evade income and victory taxes due the United States for the years 1942 and 1943. Affirmed.

IRVING H. SAYPOL, United States Attorney for the Southern District of New York, *Attorney for Appellee;*

Bruno Schachner, Albert A. Blinder, Robert M. Reagan, Florence P. Shientag, Assistant United States Attorneys, of Counsel.

EUGENE A. SHERPICK, JOHN MCKIM MINTON, *Attorneys for Appellants;*

Eugene A. Sherpick, John McKim Minton, Richard T. Davis, of Counsel.

CHASE, *Circuit Judge*:

During the years 1941 and 1942, appellant Aaron and his stepson, appellant Freidus, were in partnership with their wives doing business in the City of New York under the firm name of Aaron Machinery Company. The partnership business, which was conducted by the appellants, was that of buying and selling second-hand machinery which was in great demand at that time, and the purchases and sales were extensive. Adequate books of account were kept but it was proved, without dispute, that not all of the receipts from sales were entered in them. Ordinarily, consecutively numbered invoices were sent to purchasers and the payments received entered in the books to be used in the computation of taxes due the government. But whenever the appellants saw fit to depart from this practice an unnumbered invoice was used to cover a sale, and when this was done the payments received were not entered upon the partnership books or deposited in the active banking account of the partnership. Instead, they were deposited in three other banks in each of which an account was carried

in the name of the partnership. Records of these accounts were in charge of an employee maintained at the address where the partnership had formerly had its principal office and place of business, but no record of them was kept at the current principal office of the partnership. It was shown that during the two years above mentioned sales approximating $282,942 were not carried into the partnership books but were by the appellants diverted to these secret bank accounts and eventually withdrawn by the partners untaxed. By so doing the appellants, so the government contended, attempted to defeat and evade taxes due the United States from themselves and their wives.

The defense was that the distribution of these secret deposits to the partners resulted in no taxable income because the proceeds were used for deductible business expenses of two kinds.

One was the repayment to the partners of $105,000 which they had advanced to the partnership and for which it was indebted to them at the beginning of the two-year period here involved; the other was the purchase of machinery which could be obtained only for cash. In further explanation of this method of conducting part of the business the appellants, both of whom testified in their defense, undertook to prove that they so acted under the advice of their accountant to avoid tax problems which might otherwise arise, though the accountant, called as a witness for the government, denied that.

The sufficiency of the evidence to support the verdict is unquestioned, but the appellants rely for reversal upon what they say are three trial errors. The one most earnestly pressed is the misconduct of the trial judge, and the others are an attempt by the prosecutor to introduce an inadmissible exhibit during the cross-examination of a witness for the defense and the reception of the testimony of a witness for the government as to something which could not have been within her actual knowledge.

The conduct of the judge which the appellants insist is reversible error was what is said to have been his un-

justifiable interruption of counsel's examination of witnesses and his interrogation of them too frequently and at too great length, the greatest stress being placed upon his so doing while each of the appellants was testifying. This, coupled with his display of skepticism as to their veracity and on one occasion his actual expression of his disbelief of the testimony of a defense witness, is said to add up to reversible error.

It would serve no purpose now to repeat in substance the numerous admonitions which appellate judges have written for the guidance of trial judges on this subject. If reference to some of them isn't enough it is difficult to comprehend how a multiplication of words in like vein would help. See *United States* v. *Marzano,* 2 Cir., 149 F. 2d 923, 926; *United States* v. *Minuse,* 2 Cir., 114 F. 2d 36; *Gomila* v. *United States,* 5 Cir., 146 F. 2d 372, 374; *Williams* v. *United States,* 9 Cir., 93 F. 2d 685; *Adler* v. *United States,* 5 Cir., 182 Fed. 464. As these cases well show, there have been times when judges have so overstepped the bounds of judicial propriety that reversals on that account have followed conviction. On the other hand it seems equally needless now to deal, except by reference to some of the cases, with the right, indeed the duty in the exercise of a wise and just discretion, of trial judges to act in the interrogation of witnesses and otherwise to the end that trials will not be mere contests in forensic skill between opposing attorneys, but that the truth shall emerge so far as possible and be given its full legal significance in the judgment. *Quercia* v. *United States,* 289 U. S. 466; *Glasser* v. *United States,* 315 U. S. 60; *Simon* v. *United States,* 4 Cir., 123 F. 2d 80, 83; *Kettenbach* v. *United States,* 9 Cir., 202 Fed. 377, 385. Nor is an apparently needlessly great number of questions asked by the judge error *per se.* Each instance of the questioning on review of the conduct of the trial judge will present its own problems, and in their solution the overriding consideration should be whether the judge saw to it that in the end the jury had before it

all, and only, the admissible evidence produced, and that it was given to understand that it was free to find the facts as in its collective judgment the evidence showed them to be.

Judged by that standard we think the trial judge did not fall into error. Much of the fault found with him concerns what did not occur within the presence or knowledge of the jury. That which did needs no additional comment except to note that after the questioning by the court of one of the appellants' witnesses, Rosen, the judge remarked "I do not believe this testimony at all." Thereupon the appellants' trial attorney stepped to the bench and moved for a mistrial, though not within the hearing of the jury. This motion was denied as were other motions, each made outside the hearing of the jury, whereby the issue of the conduct of the judge was raised. Appellants' attorneys were throughout the trial understandably reluctant to object before the jury. When this motion was made the judge was not requested to, and did not, tell the jury at once that his opinion so expressed should be disregarded. But in his charge, which was, however, not delivered until seventeen days later, he did do so and advised the jury as follows:

"In our system of jurisprudence, there is a complete line of demarkation between the duties of the judge, on the one hand, and those of the jury, on the other. It is my function to set forth the rules of law which govern the case. • • •

"On the other hand, you are the sole and exclusive judges of the facts and the exclusive judges of the credibility of the witnesses.

"I will refer later to the meaning of 'credibility of witnesses.' If, during the course of the trial, I made any statements that may have indicated to you that I have an opinion as to the ultimate facts in this case, you are to disregard them. They are not binding on you, because, as I have stated, you are the exclusive judges of the facts and the credibility of the witnesses.

"On one occasion I did make a comment with respect to the testimony of the witness Louis Rosen. You are to disregard that comment made by me because, as I have indicated to you, you members of the jury are the exclusive judges of the facts and are the sole judges of the credibility of the witnesses who have appeared before you and, in the last analysis, the responsibility is yours to decide those facts and to render your verdict accordingly.

"During the trial I have addressed questions to some of the witnesses and have made statements to counsel. Such questions as were asked by me were for the purpose of eliciting facts to aid you in your deliberations. If any of you have formed any impression that I accentuated certain facts elicited, you must put that completely out of your minds. All facts were elicited for the purpose only of aiding you in your deliberations and were not intended to be, nor are they any expression by me on the facts or the credibility of any of the witnesses."

Despite the time lapse between the occurrences of which complaint is made and the charge, we think the jury was so clearly told that its own judgment of the force and effect of the evidence should be its sole basis for decision as to the facts that no reversible error appears. Moreover, while Freidus was testifying the judge twice called the attention of the jury to what was thus covered more fully in the charge. On the first occasion, after eliciting by his questions facts which had a tendency to show that the witness had used questionable business practices, the judge limited the facts so brought out to the issue of the credibility of the witness and defense counsel accepted that as "very satisfactory." Later, the witness, who had gone to college, testified that he understood the word "property" as used in a questionnaire he had filled out to mean "a building or a house or land." The judge commented, "Our colleges do not do a very good job apparently." He then continued by saying that no opinion of his was binding on the jury and that, "The jury at the conclusion of this case will be in-

structed that they are the sole judges of the fact[s] and the credibility of all the witnesses." It has long been the law that in a federal court the judge "has the authority to interrogate witnesses, and to express his opinion upon the weight of the evidence and the credibility of the witnesses." *Kettenbach* v. *United States, supra,* at page 385. But of course the jury should be made to understand, as we think it was here, that it was in no way bound by any observations of the court.

The second point relied on concerns an episode in the cross-examination of appellant Freidus. He had testified that in 1941 he had borrowed $25,000 from his grandfather, Samuel Selinsky, and his great grandmother, Ida Selinsky. It had been shown that appellant Aaron had in a Selective Service questionnaire listed Samuel Selinsky as a dependent. Freidus was asked if he knew that a Robert Selinsky, his maternal uncle, had also listed them as partial dependents and replied, "I do not know." Asked whether Robert Selinsky had listed them in his Selective Service affidavit in November, 1943, as the recipients of old age pensions he said he did not know. Both answers were received over the objection of counsel for the appellants. Later in rebuttal the government called the assistant chief of records for Selective Service in New York City. She produced the file of Robert Selinsky and the assistant district attorney had it marked for identification. Then the witness was asked to examine it and to state "who are the relatives of Robert Selinsky?" An objection to this was sustained. The next question was, "Is Becky Aaron listed as a relative of Robert Selinsky?" When objection was made the judge said, "Sustained. And please do not refer to the paper again, Mrs. Shientag. Do not refer to the contents of the paper." The obvious purpose of the prosecutor was to show that the grandparents of Freidus did not in 1941 have $25,000 to lend him as he said they did. It seems, from what then occurred at the bench where the prosecutor persisted in offering the paper, that she thought it was by thus being

filed with the government made admissible as independent evidence of the financial inability of the Selinskys to make the loan to which Freidus had testified. The judge explained to her that she was wrong and there the matter ended. We think the mere statement of what happened provides a sufficient answer to the contention that reversible error occurred. The district attorney was apparently acting in good faith but upon the mistaken notion as to admissibility above mentioned.

The last point relates to the calling of the widow of Stanley Selkowsky in rebuttal. The appellants had testified, in accounting for the business use of the money which had been received by the partnership and not entered in the regular books of account, that they had used $30,000 to pay Stanley Selkowsky for a purchase of machinery from him. Mrs. Selkowsky testified that until her husband died in May, 1941, he dealt in used machinery, having his place of business in an old blacksmith shop in Secaucus, N. J., over which they lived with their three children, and that about a third of the space in the shop was taken up by a bin in the back in which they kept coal and wood for household use; that he kept sales books; that he billed purchasers for machinery which he sold; that she wasn't in the business with him but looked after it for him at times when he was not in the shop; that after he died she continued the business herself for a while, though when she testified she was a maid in a hotel at Miami, Fla. She was asked, "Now, Mrs. Selkowsky did your husband ever receive $30,000 in cash?" Over objection she was permitted to answer, "No, he did not." She stated further that she was positive that he did not and under further questioning both by the assistant district attorney and by the court testified that her husband had a small business; did the work without any employed help; had not had a very large amount of machinery at one time during the few months before his death; and did not have $30,000 in machinery in 1941. On cross-examination she was asked, "Well, how

would you know about a deal that took place if you were not present?" And she answered "My husband would tell me about it. He would tell me everything."

It seems obvious that it must have been apparent to the jury that this widow did not know as positively as she testified she did that her husband had never made a sale of $30,000 worth of used machinery. But her testimony did show, if believed, that she had personal knowledge of him and of the size of his business sufficient to put such a sale beyond reasonable probability. To think for a minute that the jurors listening to her would give it any more weight than that would seem to be a gratuitous denial of their possession of ordinary common sense.

Judgment affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 192

JACOB FREIDUS, *Petitioner*

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Court of Appeals (R. 1596-1602) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 20, 1951 (R. 1603.) The petition for a writ of certiorari was filed on July 17, 1951. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the petitioner was denied a fair and impartial trial by reason of the alleged conduct of the trial court.

2. Whether the trial court erred in admitting testimony by a witness concerning the business carried on by her deceased husband.

3. Whether the trial court erred in permitting the Government to question petitioner on cross-examination as to the contents of a selective service affidavit executed by his uncle.

STATUTE INVOLVED

INTERNAL REVENUE CODE:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1946 ed., Sec. 145.)

STATEMENT

Petitioner was indicted on four counts charging him with evading taxes in the total amount of $106,857.47 owed by himself and by Claire Freidus, his wife, for the years 1942 and 1943, in violation of Section 145(b), Internal Revenue Code (R. 7-10).

Samuel E. Aaron, business partner and stepfather of the petitioner, was indicted jointly with him (R. 8-11), and the cases were tried together from October 9, 1950, to November 13, 1950 (R. 3-4, 12-13). The jury returned a verdict of guilty on all counts as to each defendant (R. 4). Petitioner was sentenced to four years' imprisonment on each of the four counts, the sentences to run concurrently, and fined $10,000 on each count, or a total of $40,000 (R. 16-17)).*

Petitioner and Aaron were partners, with their wives, in the Aaron Machinery Company, a business engaged in buying and selling used and second-hand machinery (R. 353-354). Books and records were maintained in which were entered receipts from those sales represented by consecutively numbered invoices (R. 233). Income tax returns were prepared from the information contained in these records (R. 364).

It was not disputed, however, that certain customers did not receive regularly numbered invoices (R. 502). Instead, they were given unnumbered invoices (R. 260), the receipts from which sales were not recorded in the

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* Defendant Aaron was sentenced to two years' imprisonment on each of three counts and fined $10,000 on each count, or a total of $30,000 (R. 14-15). The prison sentence was subsequently reduced to eight months on defendant's application for modification. (Pet. 1.)

books (R. 260, 372) and not deposited in the regular bank account of the Aaron Machinery Company (R. 372, 504-506, 891). These unrecorded receipts were deposited in three bank accounts in the name of the partnership in three different banks, and there was evidence to show that the existence of these accounts was concealed from the partnership bookkeeper and the accountant (R. 357, 358, 371). During 1941 and 1942, petitioner admitted that sales totalling approximately $282,000 were received and deposited in the three secret accounts and not recorded in the books of the company (R. 893).

The secret bank accounts were subsequently liquidated, and it was shown that approximately $114,000 was deposited in various Federal savings and loan accounts throughout the country, and $62,000 used for real estate purchases (Govt. Ex. 117, R. 1253).

The theory of the defense was that the deposits to the secret bank accounts did not represent taxable income because the proceeds were used for business purposes, including cash payments in excess of OPA price regulations (R. 892, 1266). Petitioner and Aaron also testified that $105,000 had been advanced by them to the partnership prior to 1941 and that the secret bank accounts were used to repay these loans (R. 900, 1268). They testified that the method of diverting sales receipts had been suggested by their accountant (R. 892, 905, 1266). The accountant, called as a witness for the Government, denied any knowledge of the existence of the bank accounts or of having so advised the partners (R. 372, 373).

Petitioner has conceded the substantial nature of the evidence to support the verdict, and relies upon various trial errors in support of his petition (R. 1597, Pet. 2-4). In the main, his petition is concerned with alleged misconduct of the trial judge (Pet. 9-21). As illustrative of his allegations, he points to the examination of Louis Rosen, a defense witness, by the court and the court's remark to defense counsel that he did not believe this testimony (Pet. 20-21). Defense counsel, outside of the hearing of the jury, then moved for a mistrial on the ground that the remark was prejudicial (R. 691). The motion was denied (R. 691), and later, in the charge, the jury was instructed to disregard this remark, as follows (R. 1561):

> On one occasion I did make a comment with respect to the testimony of the witness Louis Rosen. You are to disregard that comment made by me because, as I have indicated to you, you members of the jury are the exclusive judges of the facts and are the sole judges of the credibility of the witnesses who have appeared before you and, in the last analysis, the responsibility is yours to decide those facts and to render your verdict accordingly.

During the testimony of the petitioner, the court directed a number of questions to him concerning questionable business practices (R. 929-930, 951). At the request of petitioner's counsel, the court explained to the jury that the facts brought out by his questions were to be limited to the issue of the credibility of the witness (R. 968-969). This explanation was accepted by defense counsel as "very satisfactory" (R. 969).

On another occasion, the petitioner, a college graduate, was questioned by the court as to his understanding of the word "property," and upon petitioner's reply that he understood it to mean "a building or a house or land," the court commented, "Our colleges do not do a very good job apparently" (R. 1082). The court immediately turned to the jury and advised them that any expression of opinion by him was not binding on the jury and that, "The jury at the conclusion of this case will be instructed that they are the sole exclusive judges of the fact[s] and the credibility of all witnesses" (R. 1082). This instruction was later given as follows (R. 1560-1562):

> In our system of jurisprudence, there is a complete line of demarkation between the duties of the judge, on the one hand, and those of the jury, on the other. It is my function to set forth the rules of law which govern the case. * * *
>
> * * * On the other hand, you are the sole and exclusive judges of the facts and the exclusive judges of the credibility of the witnesses.
>
> I will refer later to the meaning of "credibility of witnesses." If, during the course of the trial, I made any statements that may have indicated to you that I have an opinion as to the ultimate facts in this case, you are to disregard them. They are not binding on you, because, as I have stated, you are the exclusive judges of the facts and the credibility of the witnesses.
>
> * * * * *
>
> During the trial I have addressed questions to some of the witnesses and have made statements to counsel. Such questions as were asked by me were for the purpose of eliciting facts to aid you

in your deliberations. If any of you have formed any impression that I accentuated certain facts elicited, you must put that completely out of your minds. All facts were elicited for the purpose only of aiding you in your deliberations and were not intended to be, nor are they any expression by me on the facts or the credibility of any of the witnesses.

* * * * *

The duty of weighing the evidence and determining the credibility of witnesses is solely yours, and if you find that any statement of counsel or the court as to any fact does not accord with your recollection, you should rely on your own memory. You have seen the witnesses upon the stand and observed their manner and demeanor in giving their testimony.

* * * * *

Petitioner testified that at the beginning of 1941 he borrowed $25,000 from his deceased grandparents, Samuel and Ida Selinsky (R. 899, 900). Upon cross-examination he was asked if he knew that his uncle, Robert Selinsky, had listed Samuel and Ida Selinsky in his selective service affidavit of November, 1943, as the recipients of old-age pensions (R. 1073-1074). The petitioner's answer, admitted over objection of defense counsel, was that he did not know (R. 1073-1074). Subsequently, the Government offered Robert Selinsky's selective service questionnaire in evidence, but upon objection by the petitioner the document was ruled inadmissible (R. 1407-1411).

The witness Mary Selkowsky was called in rebuttal by the Government to refute the partners' claims that

during the period involved they had purchased approximately $30,000 worth of machinery from her deceased husband, Stanley Selkowsky (R. 1042-1060). She testified, in substance, that before her husband's death in May, 1941, he had dealt in used machinery; that his place of business was in a blacksmith shop over which they lived with their three children, and that a third of the shop was used for the storage of coal and wood for household use; that he maintained sales records and billed purchasers for machinery sold; that she did not participate in the business, but looked after it on occasions when he was not in the shop; that after his death she operated the business for a brief period. She was then asked if her husband received "$30,000 * * * in cash from the sale of machinery", and she replied, "No, he did not." (R. 1046.) Motion to strike this answer was denied (R. 1046). In response to further questioning she testified that her husband had a small business, employed no help, and did not have $30,000 in machinery during 1941. She also testified that her husband told her "everything" about his business. (R. 1046-1052.)

ARGUMENT

Apart from two minor evidentiary matters which were thoroughly considered by the court below, are peculiar to this case, and consequently do not present issues appropriate for resolution by this Court, the petition for a writ of certiorari rests entirely on the charge that the conduct of the trial judge was so prejudicial as to deny the petitioner a fair trial.

It is clear enough that in the federal courts, questioning and comments on the evidence by the trial judge is not *per se* beyond the bounds of judicial propriety. *Quercia* v. *United States,* 289 U. S. 466, 469; *Glasser* v. *United States,* 315 U. S. 60, 82; *Kettenbach* v. *United States,* 202 Fed. 377, 385 (C. A. 9th), certiorari denied, 229 U. S. 613; *Henry* v. *United States,* 273 Fed. 330, 340 (C. A. D. C.), certiorari denied, 257 U. S. 640; *Cusmano* v. *United States,* 13 F. 2d 451, 452 (C. A. 6th), certiorari dismissed, 273 U. S. 773; *United States* v. *Warren,* 120 F. 2d 211, 212 (C. A. 2d); *Simon* v. *United States,* 123 F. 2d 80, 83 (C. A. 4th), certiorari denied, 314 U. S. 694; *Todorow* v. *United States,* 173 F. 2d 439, 448 (C. A. 9th), certiorari denied, 337 U. S. 925. As succinctly stated by the Court of Appeals for the Fourth Circuit in the *Simon* case (p. 83):

> It cannot be too often repeated, or too strongly emphasized, that the function of a federal trial judge is not that of an umpire or of a moderator at a town meeting. He sits to see that justice is done in the cases heard before him; and it is his duty to see that a case on trial is presented in such way as to be understood by the jury, as well as by himself. He should not hesitate to ask questions for the purpose of developing the facts; and it is no ground of complaint that the facts so developed may hurt or help one side or the other.

The ultimate question in cases of this sort, as the court below recognized (R. 1598-1599), is whether the jury has been left free to perform its fact-finding function. That question can be answered only upon an appraisal of the whole record in a particular case, and

not merely by examining portions of the record culled by the petitioner to make his point. Such a review of the whole record was accorded the petitioner by the court below whose opinion plainly reflects a sensitivity to the requirement that neither the role of the jury nor the prosecutor be assumed by the trial judge.

The Government believes that the conclusion arrived at by the court below on this record is a correct one. The court's decision conflicts in no way with that of this Court in *Quercia* v. *United States, supra,* as contended by petitioner (Pet. 26). For the only alleged error in that case involved improper remarks of the trial judge in his charge to the jury. In the instant case, the petitioner does not assert that there was error in the court's instructions to the jury. Indeed, at the conclusion of the charge petitioner's attorney stated that it was "fair and impartial and one of the finest that I have ever heard". (R. 1582.)

The trial judge scrupulously emphasized to the jury, both during the course of the trial and in the charge, that it alone had the sole responsibility of determining the facts and judging the credibility of witnesses, and that the jurors were to disregard any comments or observations by the court bearing upon these matters (R. 968-969, 1082, 1560-1562, 1574, 1576-1577). In particular, he instructed the jury to disregard his statement bearing upon the credibility of the witness Louis Rosen (R. 691, 1561). As pointed out by the court below (R. 1600), "the jury was so clearly told that its own judgment of the force and effect of the evidence should be its sole basis for decision as to the facts that no reversible error appears".

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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